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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 MARIA GARCIA HERNANDEZ,

8 Plaintiff(s),

9 v.

10 CASE PETER VANVEEN, et al.,

11 Defendant(s).

Case No. 2:14-CV-1493 JCM (CWH)

ORDER

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13 Presently before the court is defendants Case Peter VanVeen (“VanVeen”), an individual,
14 and Case VanVeen, dba Lazevee Farms, Inc.’s (collectively, “defendants”) motion for partial
15 summary judgment on plaintiff’s third, fourth, and fifth causes of action. (ECF No. 139). Plaintiff
16 Maria Garcia Hernandez filed a non-opposition response to the motion (ECF No. 148).

17 Also before the court is defendants’ motion for partial summary judgment on the issue of
18 punitive damages. (ECF No. 140). Plaintiff filed a response (ECF No. 149), to which defendants
19 replied (ECF No. 152).

20 Also before the court is plaintiff’s motion to strike defendants’ affirmative defenses of
21 fraud. (ECF No. 141). Defendants filed a response (ECF No. 146), to which plaintiff replied (ECF
22 No. 147).

23 **I. Facts**

24 On December 18, 2012, defendant VanVeen, while driving a tractor-trailer (“truck”) on I-
25 15 near the Charleston exit, struck a car driven by Ricardo Hernandez (“the Dodge”). (ECF No.
26 149 at 42, 49). Ricardo Hernandez’s wife, Maria Garcia Hernandez, was in the front passenger
27 seat of the Dodge.
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1 The initial impact consisted of the front of the truck colliding into the back of the Dodge.
2 (ECF No. 149 at 42, 49). The first impact did not halt the momentum of the truck, and it continued
3 down the highway. (ECF No. 149 at 2). While passing the Dodge, the left side of the truck scraped
4 the right side of Dodge. *Id.* Mr. Hernandez claims that the Dodge initially stalled, but that he was
5 able to get the engine to start up again. (ECF No. 142-2 at 3). He resumed driving with the stated
6 purpose of obtaining the truck's license plate number.¹ *Id.* Thereafter, a second collision occurred,
7 when VanVeen attempted to merge to the left lane and the Dodge was in VanVeen's "blind spot."
8 (ECF No. 149 at 25, 42, 50).

9 Shortly after the second collision, both cars ended up parked on the left-side median of I-
10 15, with the truck parked in front of the Dodge. (ECF No. 149 at 35).

11 **II. Legal Standard**

12 *i. Summary judgment*

13 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
14 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
15 show that "there is no genuine dispute as to any material fact and the movant is entitled to a
16 judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is
17 "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317,
18 323–24 (1986).

19 For purposes of summary judgment, disputed factual issues should be construed in favor
20 of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be
21 entitled to a denial of summary judgment, the nonmoving party must "set forth specific facts
22 showing that there is a genuine issue for trial." *Id.*

23 In determining summary judgment, a court applies a burden-shifting analysis. The moving
24 party must first satisfy its initial burden. "When the party moving for summary judgment would
25 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
26 directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has

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28 ¹ Plaintiff asserts that defendant's failure to immediately stop constituted an attempt to flee
the scene, and that Ricardo Hernandez believed as much in the seconds following initial impact.
(ECF No. 149 at 2, 51).

1 the initial burden of establishing the absence of a genuine issue of fact on each issue material to
2 its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)
3 (citations omitted).

4 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
5 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
6 element of the non-moving party’s case; or (2) by demonstrating that the nonmoving party failed
7 to make a showing sufficient to establish an element essential to that party’s case on which that
8 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
9 party fails to meet its initial burden, summary judgment must be denied and the court need not
10 consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
11 60 (1970).

12 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
13 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
14 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
15 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
16 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
17 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,
18 631 (9th Cir. 1987).

19 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
20 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
21 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
22 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
23 for trial. *See Celotex*, 477 U.S. at 324.

24 At summary judgment, a court’s function is not to weigh the evidence and determine the
25 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*
26 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
27 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
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1 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
2 granted. *See id.* at 249–50.

3 *ii. Motion to strike*

4 Federal Rule of Civil Procedure 12(f) provides that “[t]he court may strike from a pleading
5 an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
6 Civ. P. 12(f). “The function of a 12(f) motion to strike is to avoid the expenditure of time and
7 money that must arise from litigating spurious issues by dispensing with those issues prior to trial
8” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010).

9 **III. Discussion**

10 *i. Defendants’ motion for summary judgment on plaintiff’s third, fourth, and fifth
causes of action*

11 Defendants filed a motion for summary judgment on plaintiff’s third, fourth, and fifth
12 causes of action. (ECF No. 139). Plaintiff filed a non-opposition response. (ECF No. 148).

13 “The failure of an opposing party to file points and authorities in response to any motion,
14 except a motion under Fed. R. Civ. P. 56 or a motion for attorney’s fees, constitutes a consent to
15 the granting of the motion.” LR 7-2(d). Thus, defendants’ motion for summary judgment on
16 plaintiff’s third, fourth, and fifth causes of action will be granted. Judgment will be entered in
17 favor of defendants on plaintiff’s causes of action for negligent entrustment, negligent hiring, and
18 negligent training/supervision.

19 *ii. Defendants’ motion for summary judgment on plaintiff’s request for punitive
20 damages*

21 Defendants filed a motion for summary judgment on plaintiff’s request for punitive
22 damages. (ECF No. 140).

23 Under Nevada law,

24 Except as otherwise provided in NRS 42.007, in an action for the breach of an
25 obligation not arising from contract, where it is proven by clear and convincing
26 evidence that the defendant has been guilty of oppression, fraud, or malice, express
or implied, the plaintiff, in addition to the compensatory damages, may recover
damages for the sake of example and by way of punishing the defendant.

27 Nev. Rev. Stat. 42.005. “‘Oppression’ means despicable conduct that subjects a person to cruel
and unjust hardship with conscious disregard of the rights of the person.” Nev. Rev. Stat.
28 42.001(4). “‘Malice, express or implied’ means conduct which is intended to injure a person or

1 despicable conduct which is engaged in with a conscious disregard of the rights or safety of
2 others.” Nev. Rev. Stat. 42.001(3).

3 “‘Conscious disregard’ means the knowledge of the probable harmful consequences of a
4 wrongful act and a willful and deliberate failure to act to avoid those consequences.” Nev. Rev.
5 Stat. 42.001(1). In context, conscious disregard references a “culpable state of mind” that
6 “exceed[s] mere recklessness or gross negligence.” *Countrywide Home Loans, Inc. v. Thichener*,
7 124 Nev. 725, 742–43 (2008).

8 “Whether punitive damages are appropriate and what amount is appropriate are questions
9 reserved for the trier of fact, although the court has the responsibility to determine whether, as a
10 matter of law, the plaintiff has offered sufficient evidence of oppression, fraud, or malice to support
11 a punitive damages instruction.” *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1172 (9th Cir.
12 2012) (citing *Wickliffe v. Fletcher Jones of Las Vegas, Inc.*, 99 Nev. 353 (1983) (*abrogated on*
13 *other grounds by Countrywide Home Loans, Inc. v. Thichener*, 124 Nev. 725 (2008))); *see Terrell*
14 *v. Central Wash. Asphalt, Inc.*, 168 F. Supp. 3d 1302, 1318 (D. Nev. 2016).

15 In *Terrell*, a truck driver caused an accident and fled the scene. 168 F. Supp. 3d at 1318.
16 The driver was subject to hours-of-service regulations, which act in part to prevent fatigued
17 driving. *Id.* The driver knowingly exceeded the hours-of-service regulations while driving to Las
18 Vegas. *Id.* He attempted a dangerous passing maneuver of multiple vehicles on a two-lane
19 highway in the dark, and caused a major accident. *Id.* He then fled the scene. *Id.* The court held
20 that the issue of punitive damages should be submitted to the jury, as plaintiff presented sufficient
21 evidence of “conscious disregard of the rights and safety of other motorists.” *Id.*

22 Plaintiff’s argument to support her claim for punitive damages is that defendant VanVeen
23 failed to stop immediately after the first collision.² Plaintiff argues that summary judgment is
24 improper because a dispute of fact exists as to whether VanVeen attempted to flee the scene.
25 Defendants argue that even if VanVeen attempted to flee the scene, defendants are entitled to
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28 ² Plaintiff also cites her and her husband’s belief that VanVeen was fleeing the scene.
Plaintiff cites no evidence to support this belief beyond the fact that defendant did not stop
immediately after the accident.

1 judgment as a matter of law unless plaintiff can demonstrate oppression, fraud, or malice, as
2 required by NRS 42.005.³

3 Defendants are entitled to judgment as a matter of law. Assuming *arguendo* that
4 VanVeen's failure to immediately stop constituted a brief attempt to flee the scene, this is not
5 enough without more to support a punitive damages award in Nevada.

6 Here defendants offered evidence that VanVeen attempted to drive carefully and eventually
7 pulled over on his own volition after the first collision. Plaintiff has provided no evidence to refute
8 defendants' assertions. VanVeen claims that after the accident, he drove at a speed of 35 miles
9 per hour. (ECF No. 152 at 7). Neither plaintiff nor her husband assert or offer any evidence that
10 defendant VanVeen exceeded the speed limit or otherwise drove recklessly in the minutes after
11 the initial collision. The fact that plaintiff's husband was able to re-start a stalled car and quickly
12 catch up to the truck provides additional support for defendants' assertion that VanVeen slowed
13 down after the first collision.

14 The hit-and-run cases from other jurisdictions that plaintiff relies on are factually and
15 legally distinguishable from the instant case. (ECF No. 152 at 9–11); *see Peterson v. Henning*,
16 452 N.E. 2d 135 (Ill. App. 1983) (holding that evidence of defendant's failure to stop was
17 admissible to prove negligence; no direct references to punitive damages); *see also Jones v.*
18 *Cruzan*, 33 P.3d 1262 (Colo. App. 2001) (holding that a defendant's conduct of running a stop
19 sign, driving away at seventy-plus miles per hour, and eluding a pursuing witness was relevant to
20 plaintiff's claim for punitive damages). The cases cited by plaintiff support the proposition that a
21 defendant's attempt to flee the scene of an accident may provide evidence of negligence. *See*
22 *Peterson*, 452 N.E.2d at 138. But a brief and unsuccessful attempt to flee does not, without more,
23 provide evidence of an intentional act involving fraud, oppression, or malice. *Cf. Terrell*, 168 F.
24 Supp. 3d at 1318. (holding that plaintiff presented sufficient evidence of oppression, fraud, or
25 malice when defendant knowingly violated hours-of-service regulations, attempted a dangerous
26 passing maneuver, caused a major accident, and fled the scene).

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28 ³ Defendants' motion does not admit that defendant did attempt to flee the scene. (ECF
No. 140). To the contrary, VanVeen asserts that immediately after the accident he attempted to
safely merge out of the center lane so that he could pull over and stop the truck. *Id.*

1 Plaintiff does not offer any evidence that defendant VanVeen's post-crash driving was
2 oppressive, fraudulent, or malicious. Instead, plaintiff relies on her assertion that evidence of
3 failure to stop immediately at the scene of a highway accident is sufficient to support an award of
4 punitive damages. Plaintiff's assertion does not comport with NRS 42.005.

5 Plaintiff has not presented any evidence of oppression, fraud, or malice in connection with
6 defendant VanVeen's post-accident conduct. Therefore, summary judgment in favor of defendants
7 on plaintiff's request for punitive damages is appropriate. *See Hester*, 687 F.3d at 1172; *see also*
8 *Anderson*, 477 U.S. at 249–50.

9 *iii. Plaintiff's motion to strike*

10 Plaintiff filed a motion to strike two of defendants' affirmative defenses. Plaintiff argues
11 that defendants have not met Federal Rule of Civil Procedure 9(b)'s heightened pleading standard
12 for the affirmative defense of fraud. Defendants argue that the court should not grant plaintiff's
13 motion because plaintiff's motion is untimely and because defendants have sufficiently pleaded
14 their affirmative defenses.

15 Federal Rule of Civil Procedure 9(b) reads, "In alleging fraud or mistake, a party must state
16 with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and
17 other conditions of a person's mind may be alleged generally." *Id.* [Rule 9(b)] only required the
18 identification of the circumstances constituting fraud so that the defendant can prepare an adequate
19 answer from the allegations." *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973).

20 Here, defendants filed their amended answer containing affirmative defenses 24 and 25 on
21 March 24, 2016. (ECF No. 101). The affirmative defenses contain descriptions of the time, place,
22 and circumstances surrounding the alleged fraud. These allegations are sufficient to comply with
23 the court's March 18, 2016 order and to put plaintiff on notice of defendants' proposed theory of
24 the case. *See Walling*, 476 F.2d at 397. Further, both parties conducted significant discovery
25 related to the affirmative defenses. The resulting deposition testimony of Mr. Greene, amongst
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1 others, produced evidence to support defendants' affirmative defenses.⁴ Therefore, the court will
2 deny plaintiff's motion to strike.

3 **IV. Conclusion**

4 Accordingly,

5 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants' first motion
6 for partial summary judgment (ECF No. 139) be, and the same hereby is, GRANTED.

7 IT IS FURTHER ORDERED that that defendants' second motion for partial summary
8 judgment (ECF No. 140) be, and the same hereby is, GRANTED.

9 IT IS FURTHER ORDERED that plaintiff's motion to strike (ECF No. 141) be, and the
10 same hereby is, DENIED.

11 DATED September 29, 2017.

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14 UNITED STATES DISTRICT JUDGE
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28 ⁴ Defendants correctly note in their response that on a motion to strike it is not the role of
the court to weigh the evidence.